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AE Consult Sdn Bhd v Dian Makmur Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-458–07 OF 2019
MOHD JOHAN LEE J
14 FEBRUARY 2024

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Contract — Formation — Interpretation of terms — Value re-engineering contract ('alleged contract') — Whether there was a concluded and binding contract — Whether alleged contract merely a negotiation — Whether alleged contract a precondition to enter into future agreement — Whether alleged contract was a 'subject to' contract — Whether binding or enforceable

D

Contract — Time of Essence — Counter claim — Value re-engineering contract ('alleged contract') — Termination of service due to delay — Whether there were clear terms that time was of essence — Whether parties yet to finalise actual agreement — Whether counterclaim could be sustained

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This was the plaintiff's claim ('this suit') against the defendant for the alleged breach and/or unlawful termination by the latter to fulfil its obligation under a value re-engineering contract ('the alleged contract'). The defendant was the main contractor for a construction project known as 'Nadayu 28 Sunway' ('the project'). On 30 January 2013, the defendant and the plaintiff had agreed on an arrangement, where the defendant engaged the plaintiff to complete a study on a proposed development related to the project. Unfortunately, a dispute arose when the defendant later terminated the service of the plaintiff. Dissatisfied with the termination, the plaintiff filed the present suit. The plaintiff had alleged that: (a) the plaintiff was appointed by the defendant for a new structural design that would be cost savings which was to be adopted by the defendant for the project; (b) there was an offer, an acceptance, the intention to create legal relation and consideration, therefore, the alleged contract had been properly formed; and (c) there was a binding and enforceable contract between the parties as it had fulfilled the requirement of a contract formation. In response to the plaintiff's claim, the defendant had filed a counterclaim against the plaintiff. It was the defendant's position that: (i) the appointment of the plaintiff would only be agreed and finalised if the plaintiff was able to come up with new cost savings and value engineering designs; (ii) the estimated savings claimed by the plaintiff had yet to be agreed and acknowledged upon by the defendant and the employer; and (iii) there had not been a binding and concluded contract between the parties regarding the re-engineering works. The issue that arose for determination was whether the

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dispute here was regarding the interpretation of the alleged contract.

Held, dismissing the plaintiff's claim and defendant's the counterclaim:

(1) The alleged contract was basically an agreement to conduct a study for the purpose of exploring the possibility of achieving cost-savings of the project. From this study, the parties would then negotiate and finalise another proper agreement. Hence, the alleged contract was merely an agreement to make an agreement and thus not binding or enforceable. Further, through the alleged contract, the defendant employed the service of the plaintiff to conduct a value re-engineering study to garner further information whether any cost savings can be achieved through a new re-design. Thereinafter both parties 'upon an agreement of the above savings ... shall enter into a contract ...' Only then, a final binding contract would be entered into by the parties. Hence, the alleged contract claimed by the plaintiff was merely a precondition to enter into a future agreement (see paras 17 & 31).

(2) The court could only interpret terms which had been agreed by the parties in the contract. The court did not have the power to add or vary nor stretch the terms in the alleged contract. In the present case, the parties were only at the study stage. Nothing more had been achieved here. There was no logic and rational regarding the point raised by the plaintiff that the alternative design and/or drawings had already been accepted by the defendant and thus the estimated savings had already been achieved. That had never been agreed by the parties. The wordings of the alleged contract were clear on this. Thus, no agreement had ever achieved by the parties since the savings for the design had yet to be agreed upon (see paras 18, 24 & 29).

(3) The alleged contract was a 'subject to' contract. The fact that the performance of the conditions subject to/upon had never been performed or fulfilled would only mean that the contract was not binding. The failure by the parties to pursue and execute a formal contract (because they had yet to agree on the savings amount and whether the re-engineering was indeed needed) rendered the plaintiff's claim a failure (see para 32).

(4) While there had never been any concluded contract between the parties to utilise the plaintiff's service to re-engineer, the defendant had nevertheless adopted the plaintiff's design. The plaintiff's claim here was built solely on the alleged contract as its cause of action and not any contract by conduct. Be that as it may, the usage of the plaintiff's design must be compensated. This was the perfect case for the plaintiff to be compensated under quantum merit. However, the plaintiff had not plead for it in this suit. Any claim for quantum merit must be specifically pleaded (see para 33).

(5) To award nominal damages in contractual dispute, there must be a contract on which the cause of action arose. The cause of action in the present case was structured on a contract which had never been agreed by the parties. There was no legal wrong to begin with. Thus, the plaintiff's plead for nominal damages was also binned by the court. Therefore, the entire of the plaintiff's claim was dismissed (see paras 35 & 37–38).

(6) The justification or evidence for the defendant's counterclaim was lacking. According to the termination letter, the cause for the termination of consultant service was because of a delay and unsatisfactory and/or substandard design works. However, it was clear that there had never been any term by the parties to indicate that time was of the essence. Therefore, even if there was such delay on the part of the plaintiff in delivering the design, there was no indication made by the defendant that time was of the essence before the termination letter was issued to the plaintiff. Furthermore, the essence of the alleged contract was only for the plaintiff to conduct a study for the value re-engineering. The parties would then agree on the estimated savings. Then only the plaintiff would come out with the design. Since the parties here had yet to agree on the estimated savings and yet to finalise the actual agreement, there was no delay in delivering the design (see paras 45–46 & 51–52).

(7) There was no formal reengineering agreement entered by the parties via the alleged contract. The alleged contract was only meant for a study to be conducted by the plaintiff. It was clear that the intention of the parties was to enter into a future formal agreement after the estimated savings were duly agreed between them. Unfortunately, the estimated savings had never been agreed by the parties. Accordingly, there had never been any binding agreement. Hence, the plaintiff's claim was dismissed. Likewise, there was nothing to suggest that the parties agreed that time was of essence in the plaintiff's delivery of design. Thus, the defendant had no basis to counterclaim against the plaintiff. Thence, the defendant's counterclaim was also dismissed (see para 54).

[Bahasa Malaysia summary

Ini adalah tuntutan plaintif ('saman ini') terhadap defendan atas dakwaan pelanggaran dan/atau penamatan salahnya dalam memenuhi kewajipannya di bawah kontrak kejuruteraan nilai ('kontrak yang dipersoal). Defendan merupakan kontraktor utama untuk projek pembinaan yang dikenali sebagai 'Nadayu 28 Sunway' ('projek tersebut'). Pada 30 Januari 2013, defendan dan plaintif telah bersetuju mengenai satu aturan, di mana defendan melantik plaintif untuk menyelesaikan kajian mengenai cadangan pembangunan yang berkaitan dengan projek itu. Malangnya, pertikaian timbul apabila defendan kemudiannya menamatkan perkhidmatan plaintif. Tidak berpuas hati dengan penamatan itu, plaintif memfailkan saman ini. Plaintif telah mendakwa bahawa: (a) plaintif telah dilantik oleh defendan untuk reka bentuk struktur

baharu yang akan menjimatkan kos yang akan diterima pakai oleh defendan untuk projek itu; (b) terdapat tawaran, penerimaan, niat untuk mewujudkan hubungan undang-undang dan balasan, oleh itu, kontrak yang dipersoal telah dibentuk dengan betul; dan (c) terdapat kontrak yang mengikat dan boleh dikuatkuasakan antara pihak-pihak kerana ia telah memenuhi keperluan pembentukan kontrak. Sebagai balasan kepada tuntutan plaintif, defendan telah memfailkan tuntutan balas terhadap plaintif. Ia adalah menjadi pendirian defendan bahawa: (i) pelantikan plaintif hanya akan dipersetujui dan dimuktamadkan jika plaintif dapat menghasilkan penjimatan kos baharu dan reka bentuk kejuruteraan nilai; (ii) anggaran penjimatan yang dituntut oleh plaintif masih belum dipersetujui dan diakui oleh defendan dan majikan; dan (iii) tidak ada kontrak yang mengikat dan dimuktamadkan antara pihak berkenaan mengenai kerja-kerja kejuruteraan semula. Isu yang timbul untuk penentuan adalah sama ada pertikaian di sini adalah mengenai tafsiran kontrak yang dipersoal.

Diputuskan, menolak tuntutan plaintif dan tuntutan balas defendan:

(1) Kontrak yang dipersoal pada asasnya adalah perjanjian untuk menjalankan kajian bagi tujuan meneroka kemungkinan mencapai penjimatan kos projek. Daripada kajian ini, pihak-pihak kemudiannya akan berunding dan memuktamadkan satu lagi perjanjian yang sewajarnya. Oleh itu, kontrak yang dipersoal hanyalah perjanjian untuk membuat perjanjian dan dengan itu tidak mengikat atau boleh dikuatkuasakan. Selanjutnya, melalui kontrak yang dipersoal, defendan menggunakan khidmat plaintif untuk menjalankan kajian kejuruteraan nilai untuk mendapatkan maklumat lanjut sama ada sebarang penjimatan kos boleh dicapai melalui reka bentuk semula yang baharu. Selepas itu kedua-dua pihak 'atas perjanjian penjimatan di atas ... hendaklah membuat kontrak ...' Hanya selepas itu, kontrak yang mengikat muktamad akan dimasuki oleh pihak-pihak. Oleh itu, kontrak yang didakwa dituntut oleh plaintif hanyalah prasyarat untuk membuat perjanjian masa hadapan (lihat perenggan 17 & 31).

(2) Mahkamah hanya boleh mentafsir terma yang telah dipersetujui oleh pihak dalam kontrak. Mahkamah tidak mempunyai kuasa untuk menambah atau mengubah atau memanjangkan syarat dalam kontrak yang dipersoal. Dalam kes semasa, pihak-pihak hanya berada di peringkat kajian. Tiada lagi yang telah dicapai di sini. Tiada logik dan rasional berhubung perkara yang dibangkitkan oleh plaintif bahawa reka bentuk alternatif dan/atau lukisan telah pun diterima oleh defendan dan dengan itu anggaran penjimatan telah pun dicapai. Itu tidak pernah dipersetujui oleh pihak. Perkataan dalam kontrak yang dipersoal adalah jelas mengenai perkara ini. Oleh itu, tiada persetujuan yang pernah dicapai oleh pihak-pihak kerana penjimatan untuk reka bentuk masih belum dipersetujui (lihat perenggan 18, 24 & 29).

(3) Kontrak yang dipersoal adalah 'tertakluk kepada' kontrak. Hakikat bahawa pelaksanaan syarat-syarat yang tertakluk kepada/setelah tidak pernah dilaksanakan atau dipenuhi hanya bermakna kontrak itu tidak mengikat. Kegagalan pihak-pihak untuk meneruskan dan melaksanakan kontrak rasmi (kerana mereka masih belum bersetuju dengan jumlah penjimatan dan sama ada kejuruteraan semula itu sememangnya diperlukan) menyebabkan tuntutan plaintif gagal (lihat perenggan 32).

(4) Walaupun tidak pernah ada sebarang kontrak yang dimuktamadkan antara pihak-pihak untuk menggunakan perkhidmatan plaintif untuk kejuruteraan semula, defendan bagaimanapun telah menerima pakai reka bentuk plaintif. Tuntutan plaintif di sini dibuat semata-mata berdasarkan kontrak yang dipersoal sebagai kausa tindakannya dan bukan sebarang kontrak melalui kelakuan. Walau apa pun, penggunaan reka bentuk plaintif mesti diberi pampasan. Ini adalah kes yang sesuai untuk plaintif diberi pampasan di bawah merit kuantum. Bagaimanapun, plaintif tidak memplidkan untuknya dalam saman ini. Sebarang tuntutan untuk merit kuantum mesti diplidkan secara khusus (lihat perenggan 33).

(5) Untuk memberikan ganti rugi nominal dalam pertikaian kontrak, mesti ada kontrak di mana kausa tindakan timbul. Kausa tindakan dalam kes ini disusun berdasarkan kontrak yang tidak pernah dipersetujui oleh pihak-pihak. Tidak ada kesalahan undang-undang untuk bermula. Oleh itu, plid plaintif untuk ganti rugi nominal juga telah ditolak oleh mahkamah. Oleh itu, keseluruhan tuntutan plaintif telah ditolak (lihat perenggan 35 & 37–38).

(6) Justifikasi atau bukti untuk tuntutan balas defendan adalah kurang. Mengikut surat penamatan, punca penamatan perkhidmatan perunding adalah kerana kelewatan dan kerja-kerja reka bentuk yang tidak memuaskan dan/atau substandard. Walau bagaimanapun, ia adalah jelas bahawa tidak pernah ada sebarang persetujuan oleh pihak-pihak untuk menunjukkan bahawa masa adalah penting. Oleh itu, walaupun terdapat kelewatan sedemikian di pihak plaintif dalam menyampaikan reka bentuk, tidak ada petunjuk yang dibuat oleh defendan bahawa masa adalah penting sebelum surat penamatan dikeluarkan kepada plaintif. Tambahan pula, intipati kontrak yang dipersoal hanya untuk plaintif menjalankan kajian bagi kejuruteraan nilai. Pihak-pihak kemudian akan bersetuju dengan anggaran penjimatan. Kemudian hanya plaintif yang akan mengeluarkan reka bentuk. Memandangkan pihak di sini masih belum bersetuju mengenai anggaran penjimatan dan belum memuktamadkan perjanjian sebenar, tiada kelewatan dalam menyampaikan reka bentuk (lihat perenggan 45–46 & 51–52).

(7) Tiada perjanjian kejuruteraan semula rasmi yang dimeterai oleh pihak-pihak melalui kontrak yang dipersoal. Kontrak yang didakwa

hanya bertujuan untuk kajian yang akan dijalankan oleh plaintif. Ia adalah jelas bahawa niat kedua-dua pihak adalah untuk memeterai perjanjian rasmi masa depan selepas anggaran penjimatan dipersetujui dengan sewajarnya di antara mereka. Malangnya, anggaran penjimatan tidak pernah dipersetujui oleh pihak-pihak. Sehubungan itu, tidak pernah ada perjanjian yang mengikat. Oleh itu, tuntutan plaintif telah ditolak. Begitu juga, tiada apa-apa yang menunjukkan bahawa pihak-pihak bersetuju bahawa masa adalah penting dalam penyampaian reka bentuk plaintif. Oleh itu, defendan tidak mempunyai asas untuk menuntut balas terhadap plaintif. Maka, tuntutan balas defendan juga telah ditolak (lihat perenggan 54).]

Cases referred to

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)
Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd [2014] 4 MLJ 465, FC (refd)
Ganam d/o Rajamany v Somoo s/o Sinah [1984] 2 MLJ 290, FC (refd)
Hock Hua Bank Berhad v Chan Siew Yan [2005] MLJU 273; [2005] 7 CLJ 62, HC (refd)
Mentari Sekitar Sdn Bhd v Heritage Property Sdn Bhd [2016] MLJU 1604; [2016] 3 CLJ 382, CA (refd)
Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357, CA (refd)
Pembinaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd [2014] 2 MLJ 322, CA (refd)
Rancangan Kita Sdn Bhd v Ketua Pengarah Kerja Raya Malaysia & Anor [2022] 1 LNS 1086, HC (refd)
Shirley Kathreyn Yap v Malcome Thwaites [2016] 5 MLJ 602; [2016] 8 CLJ 765, FC (refd)
Sim Ah Hee @ Lim Ah Hee & Anor v Affin Bank Bhd and another appeal [2010] 5 MLJ 1; [2010] 5 MLRA 729, CA (refd)
Sime Hok Sdn Bhd v Soh Poh Sheng [2013] 2 MLJ 149, FC (refd)
Syarikat Kemajuan Kuari (M) Sdn Bhd v Su bin Abdullah & Anor [2003] 1 MLJ 401; [2003] 1 AMR 787; [2003] 1 CLJ 578, HC (refd)
The Chartered Bank v Yong Chan [1974] 1 MLJ 157, FC (refd)
The Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd [1990] 2 MLJ 163; [1990] 1 CLJ 995, HC (refd)

Legislation referred to

Contracts Act 1950 s 56(1), (2)

Ong Keng Swee (KS Ong & Co) for the plaintiff.
Teo Lee Hoon (Tan Chuan Yong & SM Chan) for the defendants.

Mohd Johan Lee J:

INTRODUCTION

[1] This is the plaintiff's claim ('this suit') against the defendant for the alleged breach and/or unlawful termination by the latter to fulfil its obligation under a value re-engineering contract ('the alleged contract').

BACKGROUND FACTS

[2] Both parties are companies duly incorporated in Malaysia. The plaintiff specialises in providing civil and structural engineering consulting services. The defendant was the main contractor for a construction project known as 'Nadayu 28 Sunway' ('the project').

[3] On 30 January 2013, the defendant and the plaintiff had agreed on an arrangement, where the defendant engaged the plaintiff to complete a study on a proposed development related to the project:

> Proposed Development of 411 Units Condominium, 3 Tower of 30 Storey Block' on Phase 2 of the Project ...

[4] Unfortunately, a dispute arose when the defendant later terminated the service of the plaintiff via a letter dated 29 May 2013. Dissatisfied with the termination, the plaintiff filed this suit against the defendant seeking the following:

(a) RM266,361.64 being the balance outstanding fees based on the shared savings for the redesigned transfer beams;

(b) RM248,241 being the loss of the balance of the said shared savings;

(c) in the alternative, general damages to be assessed by this court; and

(d) interest and costs.

[5] In response to the plaintiff's claim, the defendant had filed a counterclaim against the plaintiff seeking for four main reliefs, namely:

(a) loss due to liquidated damages imposed by the employer amounting to RM495,000;

(b) loss and damages due to additional manpower and labour cost to expedite works amounting to RM1m;

(c) loss and damages due to additional formwork purchased amounting to RM1,276,242.05; and

(d) return and refund of all fees paid to the plaintiff in the sum of RM106,000.

THE PARTIES' CASES

[6] The plaintiff's main argument is that there is a contract agreed upon by the parties on 30 January 2013. The due savings derived from the redesign of the load bearing wall from the alleged contract amounted to RM1,723,896.50 and the plaintiff's agreed proportion entitlement to that savings was RM620,602.74. Since the defendant had received the design formation and data by the plaintiff, it is just for the plaintiff to be compensated for such works.

[7] In refuting the plaintiff's claim, the defendant argued that the estimated savings have not been materialised. The defendant has yet to accept or acknowledge the estimated savings submitted by the plaintiff. And the defendant had yet to agree to engage the plaintiff's service and entered into the contract for the plaintiff to render its service.

[8] In respect of the counterclaim, the defendant contended that the alleged savings in the redesigning is a 'subject to' contract. It is not binding until and when certain conditions were fulfilled. It also needs further agreement and confirmation of the parties. It is the defendant's case that the alleged contract relied upon by the plaintiff was merely an agreement to conduct a study and it was subjected to a further contract to be binding and enforceable. Due to the delay of the plaintiff in providing the final savings report, the defendant had incurred losses when it was forced to pay liquidated damages imposed by the owner of the project ('the employer').

[9] Furthermore, to expedite the works and to avoid more and additional liquidated damages, the defendant had to put in additional manpower and thereby incurred more labour cost. Thus, the defendant premised that it had incurred extra expenses and cost:

No	Item	Amount (RM)
1	Liquidated damages imposed by the project owner for delay of 99 days @ RM5,000 per day	495,000
2	Additional manpower, labour, and other costs to expedite the works	1m
3	Additional formwork purchased to expedite the works	1,276,242.05
	Total	2,771,242.05

[10] In rebuttal, the plaintiff alleged that the liquidated damages imposed by

the employer in relation to the delay had no correlation with the plaintiff. The construction can and should be able to proceed without waiting for the final tabulated savings from the plaintiff.

[11] The plaintiff further argued that the said counterclaim of additional manpower, labour, and other cost is without basis. No documents were provided and thus the defendant had failed to discharge its burden of proof to establish its counterclaim.

DECISION AND FINDINGS OF THE COURT

[12] After perusing the cause papers, the witnesses' statements, the notes of proceeding, and the written and oral submissions and replies by the parties, I dismiss both the plaintiff's claim and the defendant's counterclaim. Herein are my reasons.

[13] The crux of this suit is regarding the alleged contract entered into by both parties on 30 January 2013. The plaintiff in its submission premised that the plaintiff was appointed by the defendant for a new structural design that would be cost savings which was to be adopted by the defendant for the project. To support, the plaintiff's counsel quoted the case of *Hock Hua Bank Berhad v Chan Siew Yan* [2005] MLJU 273; [2005] 7 CLJ 62, where His Lordship Malik Ishak J (as he then was) elucidated at p 67 para (d) to (h):

> To amount to a contract, the arrangements between the parties must exhibit certain key characteristics may be tabulated in this way:
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> (a) offer;
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> (b) acceptance;
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> (c) consideration;
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> (d) intention to create legal relations;
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> (e) mutuality;
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> (f) capacity; and
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> (g) legality
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> The offer and acceptance would form the basis of the agreement between the parties and that agreement must be supported by consideration in order to establish the obligation. The parties too must certainly intend to create legal relations and the parties and that they must certainly intend to create legal relations and the parties must also agree on the same thing. There must be mutuality between the parties and that they must be legally capable of reaching a binding agreement. Finally, the subject matter of the parties agreement must be legal. If all these seven elements are present, the agreement can be said to be a contract capable of being enforced legally.

[14] The plaintiff contended that in this case, there was an offer, an acceptance, the intention to create legal relation between the plaintiff and the defendant and there was consideration. Therefore, the alleged contract had been properly formed.

[15] Meanwhile, the defendant argued that the appointment of the plaintiff would only be agreed and finalised if the plaintiff was able to come up with new cost savings and value engineering designs. It is the defendant's submission that the estimated savings claimed by the plaintiff had yet to be agreed and acknowledged upon by the defendant and the employer.

[16] Following different interpretations of the parties on the alleged contract, it is the duty of this court to interpret the alleged contract. In the present case, the plaintiff avers that there is a binding and enforceable contract between the parties as it had fulfilled the requirement of a contract formation. The defendant, on the other hand, submitted that there had not been a binding and concluded contract between the parties regarding the re-engineering works. The dispute here is regarding the interpretation of the alleged contract. The simple alleged contract states as follow:

> Dian Makmur Sdn Bhd (231481-m) at No. 11A, Jalan TPT, Taman Perindustrian Sime UEP, 47600 Subang Jaya, Selangor for one party has given their expressed intention to engage AE Consult Sdn Bhd at 36A, Jalan SS2/67, 47300 Petaling Jaya another party for complete study of the current project:
>
> Proposed Development of 411 Units Condominium, 3 Tower of 30 Storey Block Consist of: Phase 2
>
> (a) 3 Storey Podium Car Park and 1 Storey Basement.
>
> (b) 1 Storey Public Facilities Consist of Multipurpose Hall, Gym, Children Care, Payer Room, and Public Sore Area.
>
> (c) Block A, 137 Units 24Storey Inclusive of 1 Storey Sky Lounge;
>
> (d) Block B, 135 Units 23 Storey Inclusive of 1 Storey Sky Lounge;
>
> (e) Block C, 136 Units 23 Storey Inclusive of 1 Storey Sky Lounge;
>
> On Lot 28605 (5.5 ekar), Sebahagian Lot HS(D) 23755 (PT9339), Jalan PJS 11/7, Mukim Damasara, Selangor.
>
> *For value engineering based on previous proposal made. From that study a load bearing wall design was proven to be economical and efficient prompting Dian Makmur Sdn Bhd to make detailed study for even more savings. The study shall provide the estimated savings derived solely from steel and concrete and replacement of brick walls.*
>
> *Upon agreement of the above savings both parties (Dian Makmur Sdn Bhd and AE Consult Sdn Bhd) shall enter into a contract to share in the savings derived.*
>
> Bill of Quantities

The total value of the study and savings is based on the bill of quantities computed by the Q.S to the project. The quantities and unit pricing of concrete and steel quoted in the bill of quantity shall apply.

These value of the concrete, steel and brickwork shall also be agreed upon by all parties. The following will apply to all the structural components as stated and futures add on until completion of the whole project.

Transfer Beam

The estimated savings in the steel and concrete for redesigning still offers an attractive 30% more.

Estimated savings:

Concrete total value (2459.m3 x263.52) = RM648,101

Steel total value (331,014kg x 3.25) = RM1,075,795.50

Fees

AE Consult Sdn Bhd shall charge a preliminary fee of RM16,000 (Ringgit Malaysia: Sixteen Thousand) for the study. This payment is payable upon official engagement by Dian Makmur Sdn Bhd by way of an official appointment letter.

The total quantum after the study shall be agree upon by all parties concerned and shall be confirmed and agreed upon for proper governance. The quantum is as follows

AMOUNT SAVED RM1,723896.50

Dian Makmur Sdn Bhd 64%

AE Consult Sdn Bhd 36%

Dian Makmur Sdn Bhd agrees to the settlement of 64% of the quantum derived RM1,723,896.50 while AE Consult Sdn Bhd will receive the balance of 36% as fees and as appointed consultants for the project.

Payment of Fees to AE Consult Sdn Bhd

The payment to AE Consult Sdn Bhd by Dian Makmur Sdn Bhd is agreed as follows:

30% RM186,180.82 upon appointment for structural designing,

30% RM186,180.82 upon receipt of structural drawings,

10% RM62,060.27 CONSECUTIVELY UNTIL FULL PAYMENT

[17] Looking at the above, I have to disagree with the plaintiff's contention on this matter. The content of the alleged contract clearly stipulates that, through the alleged contract, the defendant engaged the plaintiff to conduct a study towards cost savings design. Only a study. The alleged contract is basically an agreement to conduct a study for the purpose of exploring the possibility of achieving cost-savings of the project. From this study, the parties

would then negotiate and finalise another proper agreement. I agree with the defendant's contention that the alleged contract was merely an agreement to make an agreement and thus not binding or enforceable. The term 'Upon agreement of the above savings both parties (Dian Makmur Sdn Bhd and AE Consult Sdn Bhd) shall enter into a contract to share in the savings derived' can only be interpreted to mean that after a specific amount or calculation has been agreed by the parties on the savings achievable from the cost savings design study conducted, the parties would enter into another formal contact. It is in this formal contract that the parties would agree on the sharing of the savings derived. This is expressly stated in the alleged contract.

[18] It is trite law that the court can only interpret terms which had been agreed by the parties in the contract. This court do not have the power to add or vary nor stretch the terms in the alleged contract. This has been illustrated in several trite case laws.

[19] In the Court of Appeal case of *Sim Ah Hee @ Lim Ah Hee & Anor v Affin Bank Bhd and another appeal* [2010] 5 MLJ 1; [2010] 5 MLRA 729, His Lordship Tengku Baharudin Shah JCA held that in every case, the courts strive to ascertain, on an objective basis, what the parties intended a written instrument to mean:

> [10] The law is that when the terms of a contract is reduced into a form a document, no evidence shall be given in a proof of the terms of the contract except the document itself (see s 91 of the Evidence Act 1950). The Federal Court in *Union Workshop (Construction) Co v Ng Chew Ho Construction Co Sdn Bhd* [1978] 2 MLJ 22; [1977] 1 MLRA 166 held that when the meaning of a contract was clear there could be no resort to other documents to give another meaning to it. And it is trite that it is not legitimate to use as an aid in the construction of a contract anything which the parties said or did after it was made. Otherwise, the contact might mean one thing on the day it was signed and something else a month or a year later because of the intervening events (*See Perwik Sdn Bhd v Lee Yen Kee (M) Sdn Bhd* [1996] 1 MLJ 857; [1995] 5 MLRH 33 at p 862 (MLJ).
>
> ...
>
> [14] *In short, the question to be asked is the meaning of what the parties have said and not what they mean to say. In other words, if the contract reduced into a document, it must be read within its four corners*. As contended by Puan Lee for the respondent, if you seek to bring in other documents then it must be incorporated and stated to include those documents, which is not the case here. (Emphasis added.)

[20] Likewise, in *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357, His Lordship Mohd Ghazali JCA cited the judge of Lim Beng Choon J (as he then was) in *The Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163; [1990] 1 CLJ 995 regarding the general principles of construction of a contract that:

... the first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purposes of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it. (Emphasis added.)

[21] Also, in *Mentari Sekitar Sdn Bhd v Heritage Property Sdn Bhd* [2016] MLJU 1604; [2016] 3 CLJ 382, Idrus Harun JCA (as he then was) enunciated that:

[16] In the Federal Courts case of *Keng Huat Film Co Sdn Bhd v Makhanlal (Properties) Pte Ltd* [1984] 1 MLJ 243; [1983] 2 CLJ 187; [1983] CLJ Rep 186, Mohamed Azmi FJ stated:

It is a well-established rule that the court cannot construe a legal document such as a lease by the acts of the parties or their own understanding of the document ... As far as our law is concerned, the exclusion of oral by documentary evidence, is governed by ss 91 to 92 of the Evidence Act 1950. Section 91 provides that the contents of a document must be proved by the document itself, and s 92 provides that subject to certain provisos, no evidence of any oral evidence or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from its terms ... evidence of negotiations, or of the parties' intentions...ought not to be received ...

...

[18] *The appellant was obviously seeking to re-write the sale and purchase agreement between the parties to add in a new clause or term which says that 'time will be extended for payment of the balance purchase price pending the construction of the highways access roads and utilities' which clearly contradicts the various express terms of the sale and purchase agreement. This is prohibited by ss 91 and 92 of the Evidence Act 1950 and patently tantamount to re-writing the terms of the sale and purchase agreement* and the Federal Court in the above cases had clearly warned against the danger of judicially re-writing such a concluded contract or agreement. (Emphasis added.)

[22] Similarly, in my recent judgment in *Rancangan Kita Sdn Bhd v Ketua Pengarah Kerja Raya Malaysia & Anor* [2022] 1 LNS 1086, I had observed that 'the cardinal rule of interpretation premises that the court will give effect to the plain and unambiguous meaning of the contractual term as expressed by parties. In other words, it does not matter what parties thought the contractual term meant for, what matters is what has been clearly and expressly stated in the contract'.

[23] From the reading of the alleged contract, the intention of the parties is clearly:

(a) the plaintiff must conduct a study;

(b) the fee payable to the plaintiff for such study is RM16,000;

(c) the study must show information/ summary that the proposed approach by the plaintiff would be more cost-savings. The summary must provide details of the estimation of such savings;

(d) when both parties agree with the estimated savings, both of them should then entered into an agreement to share this savings;

(e) with this agreement to share savings, the defendant would appoint the plaintiff to be the designer for the new structural design;

(f) the saving effected through this new design must cause 30% or more saving from the original; and

(g) whatever figure stated in the alleged contract is pre-study estimation from the previous proposal. The actual estimation will be mutually agreed upon by the parties after the actual study conducted by the plaintiff. This study is a more detail study aiming to achieve more savings.

[24] It is obvious that in our present case, the parties were only at the study stage. Nothing more had been achieved here. I do not see any logic and rational regarding the point raised by the plaintiff that the alternative design and/or drawings had already been accepted by the defendant and thus the estimated savings had already been achieved. That had never been agreed by the parties. The wordings of the alleged contract are clear on this.

[25] Also, the defendant contended that the estimated savings was not conclusive and had yet to be agreed upon. Not only that, there was also queries toward the calculations of the plaintiff's estimated savings. During cross-examination, DW1 testify that:

[NOP Vol 2 at pp 73–75]

OKS: Now, at page 74, one day after the contract's been signed, Soo Kam Ying wrote a note for clarification to Ir Cheong, are you aware?

CHAN: Yes. I'm aware.

...

OKS: Yes. Now, at page 74, the figure total savings, yes RM1,723,943.994 is stated there. Can you see the figure?

CHAN: Yes, I can see the figure.

OKS: Yes. Now, this figure is then used, incorporated into the contract at page 3. In fact, page 3 quoted a slightly lower figure compared to page 74. Lower by maybe RM100 or so.

...

CHAN: Is the correct figure is not, it's a different of RM100, that one I don't know.

OKS: Yes.

CHAN: But this not a contract, it's just executive set of summary prepared by the plaintiff, alright, so that we can move on from there. At the end of the day, we have to work on the actual saving. Means the drawing can be used for constructions, must be accepted by the client and the engineers, right? So, whatever the calculation here, we haven't agreed anything.

OKS: Ir Chan, if the figures have not been agreed upon, why did you sign the contract?

CHAN: On that particular time, when you sign a contract, we never agreed on the figure. We only that, this estimated figure. So, I take it that estimated means you have to at the end of the day, to calculate the actual saving.

OKS: Yes. Ir Chan, I put it to you the actual saving as per the defendant's drawings has already been jointly measured, calculated —

CHAN No.

OKS And incorporated into —

CHAN No.

[26] Likewise, DW8 when cross-examined by the plaintiff's counsel testified and confirmed that the clarification on the estimated savings has yet to be agreed upon.

[NOP Vol 5 at p 81]

OKS: You were actually asked a lead question. Can you tell the Court whether Mr Cheong said is true? After quoting all these, what Mr Cheong said, your answer was, 'No, that is not true. There was no tabulation, checking or agreement between myself and Mr. Cheong regarding cost comparison of pages 66 to 74, Bundle B2.' Now I put it to you that unless you tabulate yourself, you measure yourself, unless you check, you would have not been able to raise that point for clarification, Mr Soo. You can agree or disagree. I put it to you, I'm suggesting to you, unless you check, you verify, you tabulate, the figures, you cannot raise that clarification point to page 74.

SOO: Not true. I just clarified his figure only. Not doing any measurement, not doing any tabulation. I doesn't [sic] agree it's the figure. No agreement.

OKS: Come to agreement. After you sought clarification and clarification was given, you did not revert back with any more clarification nor dispute. I put it to you that is an agreement to the figure.

SOO: I don't agree.

OKS: You don't agree?

SOO: I don't agree.

[27] Also, during re-examination, DW8 emphasised that the estimated savings are only estimation.

[NOP Vol 5 at pp 92–93]

TLH: So it was also suggested to you that after you clarification, there was nothing else that was done. And then you said there is no further query on that as far as you know. And then you said he should proceed to do all the design. What did you mean, Mr Soo?

SOO: What I see here is just to, this Plaintiff trying to find out, telling us what is the saving [sic]. So that maybe an agreement to be signed or at the end of the day he can proceed further. That basically that is the working showing us the saving. Try to convince us to appoint him. That is the, that's why he worked out an estimated saving.

TLH: I see, estimated savings.

SOO: To engage him on board he must definitely show something. But he tells us this figure.

TLH: Ok.

SOO: So, maybe our boss agreed to it, on the saving which is the estimated Right from beginning it's just the estimated figure not the actual saving.

[28] Not only that, PW1 himself admitted that the estimated savings actually depending on whether the alternative design created by them was accepted by the defendant and the project consultants.

[NOP Vo 1 at pp 50–51]

CSM: Whether the estimated savings will translate the actual savings will depend on whether the alternative design to be proposed by the plaintiff is accepted by the Project Consultants and the Employer of the project, correct?

CHEONG: Correct.

CSM: Now, it will also depend on the actual design that is approved and accepted for construction by the Project Consultants and the Employer, correct?

CHEONG: Yes

CSM: Now so whether the plaintiff's alternative design will or will not result in the savings of RM1,723,896.50 remains to be seen at the point if entering into this contract, into this, whatever documents that is signed between the parties, you agree? At pages 1 to 4 of B1.

CHEONG: 1 to 4?

CSM: At that point in time, whether the plaintiff's alternative design will or will not result in the savings of RM1,723,896.50 remains to be seen, correct? At this point in time, Mr Cheong.

CHEONG: At this point in. time, yes. CMS You agree?

CHEONG: Yes.

CSM: At this point in time meaning 30/01/2013, correct?

CHEONG: Yes.

[29] Thus, it is this court's finding that no agreement has ever achieved by the parties since the savings for the design had yet to be agreed upon. In fact, the estimated savings was also different by the calculations of the parties themselves. How could there be an agreement when the estimation had not been finalised?

[30] There is no doubt that the drawings were used by the defendant as highlighted by the plaintiff. DW1 mentioned during re-examination that the reason for using the plaintiff's design was because of the delay.

[NOP Vol 3 at pp 21–22]

TLH: Alright. I move. Now, you were questioned on page 82, which is your termination at page 82 at B2, alright. And you were asked, 'Did you revert back to the client consultant design?' No. You said, 'We did not revert back.' And then you continued, and it was suggested to you, you continued to use the plaintiff's design, and you said yes. Can you explain why you continue to use the plaintiff design?

CHAN: *It's very simple, because we got no more time to waste. We already delay we're supposed to start the transfer beam on the 25th of April, and I got the drawing approved only on the 30th of May. And I need time to do the preparation, everything, before you can complete the transfer beam. So, no other choice, and at the same time also, his design for the wall supposed to come as well, because even that, you, with the transfer beam detail, give it to you, you cannot complete the transfer beam because you still need wall reinforcements where the wall sits. How does the wall sit, and the steel bar has, have the connection. You cannot just cast a beam and then forget about the top floor. Then there's no continuity in the design. Then the structures will be not sound, yes*.

TLH: No continuity in the design? What does that mean, no continuity?

CHAN: *Because after the transfer beam, the wall sits on the transfer beam, alright? So, he changes the design, you change the design, then you have to provide the design for the wall as well*.

TLH: Ok.

CHAN: *Because after the transfer beam, the wall sits on the transfer beam, alright? So, he changes the design, you change the design, then you have to provide the design for the wall as well*.

TLH: Ok.

CHAN: Alright, where the wall sits on the transfer beam. And there's no detail yet on that particular moment.

TLH: Ok.

CHAN: Alright, where the wall sits on the transfer beam. And there's no detail yet on that particular moment.

TLH: Now —

CHAN: I already wait for five months for his this one. So, you want me to wait for another five months for the walls? (Emphasis added.)

[31] It is clear that through the alleged contract, the defendant here employed the service of the plaintiff to conduct a value re-engineering study to garner further information whether any cost savings can be achieved through a new re-design. Thereinafter both parties 'upon an agreement of the above savings ... shall enter into a contract ...' Only then, a final binding contract would be entered into by the parties. the alleged contract claimed by the plaintiff was merely a precondition to enter into a future agreement. As highlighted by the late Gopal Sri Ram JCA (as His Lordship then was) in the Federal Court case of *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327, 'an agreement to make an agreement does not result in a contract'.

[32] Likewise in our present case, the alleged contract, is a 'subject to' contract. The fact that the performance of the conditions subject to/upon had never been performed or fulfilled would only means, the contract is not binding. The failure by the parties to pursue and execute a formal contract (because they had yet to agree on the savings amount and whether the re-engineering was indeed needed) renders the plaintiff's claim a failure.

[33] While there had never been any concluded contract between the parties to utilise the plaintiff's service to re-engineer, the defendant had now adopted the plaintiff's design. I am mindful that the plaintiff's claim here is built solely on the alleged contract as its cause of action and not any contract by conduct. Be that as it may and for whatever reason given, the usage of the plaintiff's design must be compensated. To this court, this is the perfect case for the plaintiff to be compensated under quantum merit. However, the plaintiff had not plead for it in this suit. It is trite that any claim for quantum merit must be specifically pleaded. The Court of Appeal couldn't be clearer in its decision in *Pembinaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd* [2014] 2 MLJ 322 when it clarified that claims of reliefs of substantive nature should not be saved by omnibus prayers. A claim for quantum meruit is a claim of substantive nature. It relates to more than a claim based on the legal effects of pleaded facts. It thus requires express pleading. Besides, sufficient facts must be adduced and established at trial to fulfil the essential four trite requirements. Likewise, the defendants must be put to such notice and be given the opportunity to

response to it both in their pleading as well as in during trial. Such substantive prayer cannot be submerged under a general omnibus prayer for relief. The claimant must expressly plead it and detail out his claim in the cause papers. The plaintiff here has not done any this regarding quantum meruit. Nothing in the pleading, nor during trial and not even during submission had the plaintiff done anything to relate this claim with quantum meruit. Hence, in all fairness, this court could not grant any relief under quantum meruit as 'appropriate relief' on my own initiative.

[34] In similar veins, the Federal Court in *Shirley Kathreyn Yap v Malcome Thwaites* [2016] 5 MLJ 602; [2016] 8 CLJ 765 had elucidated that the parties must know from the outset what they are seeking and must plead what they seek. This would put the opponents to notice of what their cases are and responded accordingly. The courts in an adversarial system could not invent causes of action or defences under the guise of doing justice.

[35] Likewise, during the delivery of my judgment, the plaintiff's counsel had swiftly asked for nominal damages although that has not been pleaded nor raised during trial or submission. That to me is too late of the day. It is mindful that nominal damages are small sum of money awarded as damages to a party who has suffered a legal wrong but no actual financial loss (or has failed to prove such financial loss). To award nominal damages in contractual dispute, there must be a contract on which the cause of action arises. The cause of action in our present case was structured on a contract which has never been agreed by the parties. There is no legal wrong to begin with. How could there be any justification for damages albeit nominal in nature?

[36] In *Syarikat Kemajuan Kuari (M) Sdn Bhd v Su bin Abdullah & Anor* [2003] 1 MLJ 401; [2003] 1 AMR 787; [2003] 1 CLJ 578, the court (at p 405) cited paras 421, 422 and 423 (pp 281–282) *OF McGregor on Damages* (16th Ed) 1997, where nominal damages could be awarded:

> (1) Where there is *injuria sine damno*
>
> ... The best statement as to the meaning and incidence of nominal damages is given by Lord Halsbury LC in *The Mediana* [1900] AC 113 at p 116 where he said:
>
> > 'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.
>
> Thus, nominal damages may be awarded in all cases of breach of contract and in torts actionable per se. Furthermore, at least nominal damages should be awarded in such cases, but not all the decisions appear to adhere strictly to this.

> It is sometimes said that the law presumes or implies damage in every breach of contract or in every tortious invasion of a legal right, and that this, therefore, would justify an award of nominal damages in such cases without proof of actual loss ...
>
> (2) Where damage is shown but its amount is not sufficiently proved
>
> Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given ... in the present case, the problem is simply one of proof, one not of absence of loss but of absence of evidence of the amount of loss.

[37] The plaintiff had not submitted anything in our present case to convince this court anything of such nature. Thus, their plead for nominal damages is also binned by this court. As mentioned earlier, this court is unable to give judgment to issues that have not been pleaded nor submitted (see *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157).

[38] Therefore, the entire of the plaintiff's claim is hereby dismissed.

THE DEFENDANT'S COUNTERCLAIM

[39] The counterclaim of the defendant was mainly premised upon liquidated damages due to the delay in completing the sample unit, additional manpower, labour, and formwork purchased to expedite work thereafter.

[40] The defendant argued that it had incurred costs because of the plaintiff's delay in submitting the alternative design, calculation and drawing for the transfer beams, shear wall and typical floor beam. DW1 testified this in the notes of proceeding quoted earlier.

[41] To refute, the plaintiff contended that the amount claimed by the defendant is without basis. Firstly, the defendant's claim for the liquidated damages was in relation to the delay in the completion of section 1–3 of sample unit (Type A, B & C). These sample units have nothing to do with the plaintiff. This is also admitted by DW4 where he testified during cross-examination that the sample units were not part of the main block.

[42] Likewise, the plaintiff disputed the defendant's claim for damages due to additional manpower and formwork. It is the plaintiff's case that the defendant had already terminated the plaintiff on 29 May 2013. The plaintiff cannot be held responsible for other additional costs to expedite the works after such termination.

[43] It is also the plaintiff's argument that there is no evidence nor proof

given by the defendant for the several additional costs allegedly incurred by them due to the plaintiff's delay.

[44] The plaintiff's counsel also highlighted that there is no delay on their part since the alleged contract does not mention anything that time is of the essence.

[45] On this issue, I must agree with the plaintiff. According to the termination letter sent by the defendant to the plaintiff on 29 May 2013, the cause for the termination of consultant service was because of a delay and unsatisfactory and/or substandard design works.

> With much regret we hereby wish to inform that your consultancy service (Valued Engineering Design) for the Nadayu 28 three tower of 30 storey engaged by Dian Makmur Sdn Bhd is to be terminated with immediate effect.
>
> As of todate your design works is still far from satisfactory which ultimately resulted in our construction works to be adversely delayed for over a month causing major disruption to physical work progress, delay in material procurement and extensive redundant work-force. Due to the severity of the delay to produce feasible construction design and drawing which affected the project at large has prompted the project Client issuing official instruction to revert back to the Client consultant design to mitigate any additional unwarranted delay ...

[46] However, in scrutinising the alleged contract and various correspondence between the parties, it is clear to me that there had never been any term by the parties to indicate that time is of the essence. In any contract, if time is of the essence of the contract, the injured or innocent party has the option to avoid the contract or insist on performance and sue for damages due to the non-performance within the stipulated time (s 56(1) of the Contracts Act 1950).

[47] However, in the event that time is not of the essence, s 56(2) of the Contracts Act 1950 comes into play. Section 56(2) states that:

> (2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promise is entitled to compensation from the promisor for any loss occasioned to him by the failure.

[48] Section 56(2) essentially spells out clearly that when a party opted to rescind a contract which has never stipulated that time is of essence, he must first give notice making time of the essence (see *Ganam d/o Rajamany v Somoo s/o Sinah* [1984] 2 MLJ 290). The said provision also allows the innocent party to recover damages for any loss due to the failure of the other party to perform his obligations under the contract.

[49] The plaintiff had cited the Federal Court case of *Sime Hok Sdn Bhd v Soh Poh Sheng* [2013] 2 MLJ 149 to establish their case on this. His Lordship Jeffrey Tan FCJ in delivering the judgment of the court premised (at pp 166–167) that:

> [26] But with respect, we do not see how those three authorities could influence the outcome here, for what were said in *Tan Hock Chans*', *Ganam Rajamanys*', and *Hind Construction Contractorss*' on the notice fixing time for performance were said in the context of the recission of a contract and not breach. Here, we are concerned not with any issue of rescission of the oral agreement but with the question of whether there could be breach by the respondent before the issuance of the appellant's notices fixing time for performance. *As we see it, a notice fixing time for performance may be necessary, it all depends on the particular facts, to make time of the essence to justify rescission of the contract (see s 56(1) of Act) to preclude the intervention of equity, or in other words, the effect of s 56(2) of the Act. The partical necessity for such a rule is that 'the notice operates as evidence of the date by which the promise considers it reasonable to require the contract to be performed, failure to perform by which is evidence of an intention not to perform* ...
>
> ...
>
> [27] But such notice is not necessary to crystallise the antecedent breach of the party in default. Section 47 of the Act provides that 'Where, by the contract, a promisor is to perform his promise without application by the promise, and *no time for performance is specified, the engagement must be performed within a reasonable time.' The promise is discharged if the engagement is performed within a time which is reasonable under the existing circumstances* (*Hick v Raymond and Reid* [1893] AC 22) ... (Emphasis added.)

[50] Furthermore, DW4 also confirmed that sample units should not have been delayed by the defendant since the work should have commenced by 17 June 2013.

> [NOP Vol 3 at pp 64–66]
>
> OKS: But I was instructed that the mock-up unit was above the carpark podium, the five-storey carpark podium. Then comes the facilities floor, then only the mock-up unit can be constructed. Can you recollect that?
>
> ZAIHAN: The mock-up unit is on the side. OKS On the side?
>
> ZAIHAN: On the side. Yes. It is not part of the main block.
>
> OKS: So, it's nothing to do with the carpark and things like this. It's by the side, is it?
>
> ZAIHAN: Yes. Shouldn't be delayed. Should be able to — OKS Come up in time.
>
> ZAIHAN: To come up, yes.
>
> OKS: So, in other words, if we look at page 223, at item 26, let's say. Mock-up units Type A, 54 days to do, the start date is 17/06/2013. So according to your testimony, by 17/06/2013 it should have been commenced.

ZAIHAN: Yes, started. Yes.

OKS: Yes, should have been started. But in this case here, the contractor didn't start it. That's why you issued the CNS at page 87, Bundle B2.

ZAIHAN: Yes

OKS: Yes. After the date of 22/08/2013, which is the date they are supposed to complete. That's why you issue it because they didn't complete. Likewise for mock-up unit Type B, if you go down at Item 88, it was supposed to start on 20/6/2013. And in this case, obviously they didn't. And you go below Item 150, mock-up Type C, it was supposed to start 25/06/2013. So, your CNC at page 87, B2, refers to the three mock-up units that they didn't complete by 22/08/2013. Do you confirm that?

ZAIHAN: Yes.

[51] Therefore, it is the view of this court that even if there was such delay on the part of the plaintiff in delivering the design, there is no indication made by the defendant that time was of the essence before the termination letter was issued to the plaintiff. Furthermore, the essence of the alleged contract was only for the plaintiff to conduct a study for the value re-engineering. The parties would then agree on the estimated savings. Then only the plaintiff would come out with the design. Since the parties here had yet to agree on the estimated savings and yet to finalise the actual agreement, there is no delay in delivering the design.

[52] This court also find that the justification or evidence for the defendant's counterclaim is lacking. It is trite law that in order for a claimant to succeed in his claim, the burden of proof is on him to prove both liability and quantum of damages. His Lordship Ariffin Zakaria CJ elucidated in the Federal Court case of *Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd* [2014] 4 MLJ 465 that:

[31] *The object of an award of damages is to give the claimant compensation for the damage, loss or injury he has suffered the damage, loss or injury he has suffered*. The general principle governing the measure of damages has its origin in the words of Lord Blackburn in *Livingstone v Raywards Coal Co* (1880) 5 App Cas 25 where he said:

> That the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparations.

[32] *It is trite law that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving liability and quantum of damages before he can recover the sum claimed. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegations forms and essential part of person's case, the proof of such*

A *allegation falls on him* (see s 103 of the Evidence Act 1950). *If he fails to prove both the liability and the quantum of damages, he loses the action.*

[33] *Therefore, in a claim for damages, it is not sufficient for the plaintiff to merely state the amount of damages that he is claiming, he must prove the damages that he had in fact suffered to the satisfaction of the court* ... (Emphasis added.)

B

[53] The defendant here has failed to establish their counterclaim. In a nutshell, I disagree with the defendant's counterclaim against the plaintiff for the alleged delay that they had suffered. There is nothing to indicate that time was of essence in providing the design. Moreover, the defendant had also never stressed about timely delivery of the design in all the correspondence between the parties.

C

CONCLUSION

D

[54] Overall, this court find that there is no formal reengineering agreement entered by the parties via the alleged contract. The alleged contract was only meant for a study to be conducted by the plaintiff. It is clear that the intention of the parties was to enter into a future formal agreement after the estimated savings were duly agreed between them. Unfortunately, the estimated savings had never been agreed by the parties. Accordingly, there had never been any binding agreement. Since the plaintiff's cause of action is under the alleged contract, this court is unable to award any relief. It might have been different if the plaintiff claimed that there was a contract by conduct or if the plaintiff is claiming for compensation under quantum merit. None of this had been the plaintiff's case. Hence, the plaintiff's claim is dismissed. Likewise, there is nothing to suggest that the parties agreed that time is of essence in the plaintiff's delivery of design. Thus, the defendant had no basis to counterclaim against the plaintiff. Thence, the defendant's counterclaim is also dismissed. I made no order as to costs.

E

F

G

Plaintiff's claim and defendant's counterclaim dismissed.

Reported by K Selvaraju

H

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